95-1102

No. _____

Supreme
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In The

Supreme Court of the United States

October Term, 1995

FGS CONSTRUCTORS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA, MICHAEL CARLOW, d/b/a, CARLOW ENTERPRISES, CAROLE OBERLITNER, CARL OBERLITNER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to clarify whether Congress intended its amendment of 25 U.S.C. 450f by P.L. 101-512 to extend liability protection of the United States to "Indian contractors" performing Indian Self-Determination and Education Assistance Act (ISDEAA) contracts or whether FTCA protection is limited only to "tribal organizations" which may themselves be a party to ISDEAA contracts as defined by 25 U.S.C. 450b(j).

2. Certiorari should be granted to clarify whether by modification of an ISDEAA contract by the Bureau of Indian Affairs to include an engineering contract, liability of the United States is extended to protect employees of the engineer under 25 U.S.C. 450f, as amended, and the FTCA.

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OPINIONS BELOW

On September 5, 1995, the United States Court of Appeals for the Eighth Circuit issued its opinion, affirming the decision of the District Court of the District of South Dakota dated November 21, 1994. The Opinion of the Court of Appeals has been published at 64 F.3d 1230 (8th Cir. 1995) (1a-12a). The District Court's Memorandum Opinion has not been published. (13a-26a).

STATEMENT OF JURISDICTION

Petitioner seeks review of an opinion of the United States Court of Appeals for the Eighth Circuit and its Judgment of September 5, 1995. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. 1254(1).

STATUTE INVOLVED

P.L. 101-512, amending U.S.C. 450f, states in pertinent part:

> With respect to claims resulting from the performance of functions during fiscal year 1991 and thereafter, or claims asserted after September 30, 1990 but resulting from the performance of functions prior to fiscal year 1991, under a contract, grant agreement, or any other agreement or compact authorized by the Indian Self-Determination and Education Assistance Act of 1975, as amended (88 Stat. 2203; 25 U.S.C. 450 et seq.)[Pub.L. 93-638, Jan. 4, 1975, 88 Stat. 2203] or

by Title V, part B, Tribally Controlled School Grants of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1968, as amended (102) Stat. 385, 25 U.S.C. 2501 et seq. (Pub.L 100-297, Title V, Part B, Apr. 28, 1988, 102 Stat. 385, known as the "Tribally Controlled Schools Act of 1988", which is classified to Chapter 27, section 2501 et seq., of this title), an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of Interior of the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided*, That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act [Act Aug. 2, 1946, c. 753, Title IV, 60 Stat. 842]; *Provided further*, That beginning with the fiscal year ending September 30, 1991, and thereafter, the appropriate Secretary shall request through annual appropriations funds sufficient to reimburse the Treasury for any claims paid in the prior fiscal year pursuant to the foregoing provisions; *Provided further*, That nothing in this section shall in any way affect the provisions of section 102(d) of the

Indian Self-Determination and Education Assistance Act of 1975, as amended (88 Stat. 2203; 25 U.S.C. 450 et seq.)[subsec. (d) of this section].

Historical and Statutory Notes for 25 U.S.C. 450f; Pub.L. 101-512, Title III, Sec. 314, Nov. 5, 1990, 104 Stat. 1959, as amended Pub.L. 103-138, Title III, Sec. 308, Nov. 11, 1993, 107 Stat. 1416.

STATEMENT OF THE CASE

In 1991 the Aberdeen Area Office of the United States Bureau of Indian Affairs (BIA) entered into a Self-Determination Contract with the Oglala Sioux Tribe (Tribe), pursuant to P.L. 93-638, the Indian Self-Determination and Education and Assistance Act (ISDEAA), 25 U.S.C. 450 et seq. The Contract was for the federal supervision and funding of necessary re-construction work on the White Clay Dam, upstream from the town of Pine Ridge, on the Pine Ridge Indian Reservation. The federal project was a product of the National Dam Inspection Act [33 U.S.C. 467, et seq., as amended] and a Presidential Memorandum dated April 23, 1977 (regarding dam safety).

Under the Self-Determination Contract (ISDEAA Contract or Contract), the Tribe was to "consult, communicate and coordinate on relevant matters" with the BIA. "[A]ll reports, studies, analyses, and plans" had to be submitted to the BIA and the Bureau of Reclamation (BOR) "for review and comment, plus required approvals". The ISDEAA Contract required the BIA: have final approval or disapproval over acquisition actions

involving consulting services; be involved in the development and submission of any proposed contract modifications, and make necessary changes therein; issue all contracts and sub-contracts for the Project; and have final approval of any "contract modification request to make the contract/subcontract a part of the prime contract".

The record shows permanent employees of the BIA exercised this authority, and were involved in inspections, decisions, and meetings regarding the contract-work from the beginning of the construction project.

Consistent with the purposes of the ISDEAA, the Tribe and BIA sought and hired Indian contractors to perform the engineering and construction tasks of the ISDEAA Contract. An Engineering Contract was executed between Cooper Consultants, Inc. (CCI), a 100% Indian owned corporation from Oregon and the Tribe, followed by a Construction Contract between the Tribe and Indian Contractor, Michael Carlow, d/b/a Carlow Enterprises (Carlow). To qualify for its contract, Carlow had to obtain performance and payment bonds in compliance with the Federal Acquisition Regulations (FAR). Carl and Carole Oberlitner signed the FAR form bond for Carlow, making the United States, and not the Tribe, the beneficiary.

Carlow, which had never constructed a dam, sub-contracted much of the work to Petitioner, FGS Constructors, Inc. (Petitioner or FGS), which had such experience. The Sub-Contract was to perform the key repair and reconstruction work on the dam gates and spillway to be accomplished by the ISDEAA Contract. The record shows FGS provided training to Indian contractor Carlow on

how to perform this kind of construction work through the performance of its contract duties.

The record shows the BIA exercised its discretion under the ISDEAA Contract and authorized "Modifications" of the ISDEAA Contract, expressly making the Tribe's Contracts with Indian contractors CCI (Modifications No. 6 and 7) and Carlow (Modification No. 9), "a part of the prime contract".

Pursuant to the terms of the ISDEAA Contract, the BIA provided over-all supervision of the dam re-construction project. CCI, on behalf of the Tribe, supervised Carlow. Under the control and supervision of employees and officials of the BIA and CCI, the work of Petitioner was immediately supervised by Carlow.

The BIA took additional steps to extend the liability blanket of the United States over the dam construction project by authorizing payment to the Bureau of Reclamation (BOR) to review and approve of the Dam's design work. According to BIA documents: "In this manner, he felt the tribe would be protected as the Bureau of Reclamation's review and approval would **make the U.S. government liable.**" (Emphasis added). Modification No. 1 to the Engineering Contract required that CCI request BIA and BOR participation in inspection and presentation of the "inverts of the outlet works" of the Dam.

The ISDEAA Contract required White Clay Dam be drained prior to BOR inspection "so that the conduits and gates are accessible and visible to facilitate the pre-design inspection." A drained lake was also the "site condition" specified in the Contract for the reconstruction work for which Carlow and Petitioner were hired.

On June 24, 1991, with the Dam still full, the Tribe gave Carlow a Notice to Proceed with its contract work, then FAXed FGS a copy, causing FGS to mobilize men and equipment to the dam site. There had been no effort by the BIA or CCI to drain the dam by that date, completely preventing any view of the gates the Petitioner was hired to repair or replace. This substantially prevented FGS from performing and caused delays in its performance of any of its subcontract work. Because FGS was issued a Notice to Proceed prior to the dam being drained to the Contract level, Petitioner suffered damages as its personnel and equipment sat idle.

The ISDEAA Contract required the Construction Contractor and Sub-Contractor to perform all work in "strict accordance" with the terms and specifications of the Contract. Petitioner, by its Sub-Contract, also agreed to assume all duties and obligations that the contractor assumed in the ISDEAA Contract, unless changed. Any changes were to be in a writing called a "Change Order", approved by Carlow, CCI, and the BIA.

According to the Plans and Specifications, once the contractor exposed a problem or changed site condition, the Contract permitted a "period not to exceed ten (10) working days from the time of problem exposure" for the inspection, evaluation and issuance of a change order to correct it.

Although the BIA and CCI knew of the necessity of draining the reservoir before the ISDEAA Contract work could begin, Change Order No. 1 (C.O. No. 1) was not signed by CCI and the BIA until August 2, 1991, some 38 days after Petitioner was given a Notice to Proceed. On

August 7, 1991, the day Carlow and Petitioner were actually issued C.O. No. 1, a meeting was held to resolve the problem of unnecessary delay in the issuance of change orders to ensure site conditions necessary for performance of the Self-Determination Contract. It was a meeting held between officials of the BIA, CCI, the Tribe, Carlow, and Petitioner.

The delay in authorizing C.O. No. 1 (June 24, 1991 to August 7, 1991) had drastic effects on Contract work and materially raised FGS's performance costs due to standby time, overtime costs, increased utility costs, costs due to weather, subsistence costs, and costs for financing and lost profits.

The dam was not to be drained to its lowest attainable level until September 19, 1991. It was still above Contract specifications. At that level, however, the dam was found to contain substantial silt, which covered the inlet gate structure and prevented inspection and determination of the problems Petitioner was hired to repair. Petitioner and Carlow first learned of this additional changed site condition, nearly three (3) months after Petitioner received the Notice to Proceed. However, records show the BIA had been aware of the silt problem since 1983. The failure of the BIA to disclose this condition, unreasonably delayed the request and issuance of what became Change Order No. 2. Administrative processing of C.O. No. 2 could already have been completed to allow for immediate silt removal as soon as the water level was sufficiently lowered, had the problem been timely disclosed. The harsh South Dakota winter which would hamper or impede the Petitioner's work was fast approaching, significantly increasing the unlikeliness of

FGS being able to complete its work within the Contract time allowed. CCI and the BIA refused to extend the contract completion time when C.O. No. 2, removing the silt from the dam's gate structure, added to Petitioner's contract duties.

C.O. No. 2, was requested by Petitioner on September 23, 1991. It was not approved by CCI and the BIA within the ten day contract limit, and not authorized until October 22, 1991.

Despite water levels higher than Contract specifications for the performance of certain work, CCI directed Carlow, who in turn directed FGS, to begin certain concrete work, stilling basin dewatering, drain cleaning, and removal of irrigation facilities by October 4, 1991. Carlow informed FGS that if such work was not started immediately, Carlow would by default terminate FGS. FGS promptly started this work despite the absence of a contractually mandated change order.

On October 8, FGS formally requested direction regarding sunken backfill and inoperable under-drains discovered when designated spillway slabs were removed. Spillway slab removal was necessary for some of the concrete work Petitioner was contracted to perform. FGS never received direction regarding the sunken backfill and inoperable under-drains from Carlow, CCI, or the BIA.

Petitioner was also damaged as a result of payments for work performed and costs incurred either being delayed or never authorized at all by CCI. The BIA failed to ensure that FGS was paid as per the provisions of the ISDEAA Contract.

On August 19, 1991, the Tribe, and principally CCI, refused to release any funds to Carlow to pay Progress Payment Estimate No. 2, a large part of which was compensation for FGS's work and expenses. Petitioner had by that point performed services and incurred costs in excess of $40,000.00 and had received only $6,608.00 in payments.

On September 7, 1991, Carlow asked for an interim pay request of $83,545.02 from CCI, including a billing of $79,566.29 for FGS. A substantial part of the $79,566.92 payment request was denied by CCI, and therefore the Tribe, though the work was performed and the expenses reasonably incurred. In turn, Carlow was unable and refused to pay FGS the balance due.

Evidence showed the Contract provisions and customary construction industry practice permitted the recording and accepting of costs under change orders in a manner which permitted a contractor to be paid upon being billed by his suppliers, so he could pay them. The custom and practice was rejected by Carlow when CCI, and therefore the Tribe, insisted on checks or receipts showing that FGS had already paid all suppliers before FGS could receive payment. Petitioner had no resources with which to comply with these unnecessary and unreasonable pre-conditions to payment.

On November 12, 1991, FGS was not only informed its "uncooperativeness" was causing coordination problems but also that most of its third payment request for services and costs was denied due to lack of proof it had already paid its suppliers. As a result of non-payment by Respondents, FGS was without funds to pay suppliers for

materials received on site, or pay other costs, and was unable to receive the benefits to which it was entitled under the Sub-Contract.

On November 13, 1991, pursuant to a Self-Determination Contract provision (which authorized suspension of work by a contractor who was not paid within 45 days), FGS notified Carlow it had no choice, financially or contractually, but to suspend operations until problems were resolved, namely: the breach due to cardinal change, defective specifications, delay in issuance of change orders, and particularly, failure to pay for work performed.

At the time FGS noticed its suspension of work, it had received $32,928.00 for work performed, despite a billed progress payment owing of $128,349.00. The bills remain outstanding.

On or about November 20, 1991, Petitioner was notified that its Sub-Contract was being terminated due to its suspension of work.

As a result of unpaid services and costs incurred in performance of the Self-Determination Contract and its Change Orders, Petitioner suffered $517,727.65 in damages, as alleged in the Complaint.

Seeking relief, Petitioner brought suit in the United States District Court for the District of South Dakota, against the United States under the Federal Tort Claims Act (FTCA) [28 U.S.C. 1346, et seq.] and the Indian Self-Determination and Education Assistance Act (ISDEAA) [25 U.S.C. 450m-1], for the negligent performance of the

ISDEAA Contract.[2] The District Court ultimately granted summary judgment in favor of the United States, determining that the United States was not liable for CCI's negligent performance of the ISDEAA Contract, since Petitioner failed to show both that CCI's Engineering Contract was itself a "Self-Determination" Contract and that CCI was an "Indian Contractor" within the meaning of 25 U.S.C. 450f. November 21, 1994 Memorandum Opinion, p. 10 (21a).[3]

The United States Court of Appeals for the Eighth Circuit affirmed. *FGS Constructors, Inc. v. Carlow, et al.*, 64

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[2] Where a contractual duty exists to supervise a federal construction project, liability will be imputed to the United States for negligent conduct under the Contract, *Block v. Neal, supra*, 460 U.S. at 299-300, 103 S.Ct. at 1094; *Bartek v. Bell-Galyardt & Wells, Inc.*, 629 F.2d 523, 529 (8th Cir. 1980), including unreasonable delays in the issuance of change orders and acting upon submittals for payment. *United States v. Rogers & Rogers*, 161 F.Supp. 132, 135-136 (S.D.Cal. 1958); *Ernst v. Manhattan Const. Co.*, 387 F.Supp. 1001 (S.D.Ala. 1974); *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397, 401-402 (Fla. 1973); *Miller v. DeWitt*, 208 N.E.2d 249, 275 (App.Ct.Ill. 1965).

[3] Neither the District Court nor the Court of Appeals elected to examine whether Carlow was an "Indian Contractor" for purposes of liability of the United States under 25 U.S.C. 450f. Nor did either lower Court examine whether the United States was liable for the negligent performance of the ISDEAA Contract by permanent employees of the BIA; or whether the exercise of contractual supervisory duties by BIA permanent employees independently imposed liability on the United States for their negligent performance of the Contract. The case should be remanded for the lower courts to determine these issues.

F.3d 1230 (8th Cir. 1995). These issues are the subject of the instant Petition.[4]

FGS also brought a diversity and federal contract action against Carlow and the Oberlitners (as sureties on the Payment Bond), under the Miller Act 40 U.S.C. 270a, et seq., for breach of contract. The District Court dismissed the contract action against Carlow and the Oberlitners by Order dated March 4, 1993, on grounds of comity and failure to exhaust Tribal Court remedies. See, *FGS Constructors, Inc. v. Carlow, et al.*, 823 F.Supp. 1508, 1511 (D.S.D. 1993). This decision was reversed by the United States Court of Appeals for the Eighth Circuit, holding the venue requirements of the Miller Act and the consent of Carlow and the Oberlitners by contract, made the Federal District Court, rather than the Tribal Court, the appropriate venue. *FGS Constructors, Inc. v. Carlow, supra*, 64 F.3d at 1233. FGS does not seek review of or raise those issues in this Petition.

Petitioner seeks the review and clarification by this Court, as to the interpretation of "Indian contractor" and the extent of FTCA protection of the United States for negligent performance of the ISDEAA contract by an Indian contract engineer, under 25 U.S.C. 450f. These were cases of first impression for both lower Courts and will be similarly a case of first impression for this Court as well.

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[4] The Court of Appeals also affirmed the District Court's denial of Motion to Amend the Complaint to include contract actions against the United States, CCI, and the Tribe, some six months before the scheduled trial date, despite an absence of any showing of actual prejudice. *Ibid*, 64 F.3d at 1235.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER CONGRESS INTENDED ITS AMENDMENT OF 25 U.S.C. 450f BY P.L. 101-512 TO EXTEND LIABILITY PROTECTION OF THE UNITED STATES TO "INDIAN CONTRACTORS" PERFORMING ISDEAA CONTRACTS, SUCH AS CCI, OR WHETHER FTCA PROTECTION IS LIMITED ONLY TO "TRIBAL ORGANIZATIONS" WHICH MAY THEMSELVES BE A PARTY TO ISDEAA CONTRACTS AS DEFINED BY 25 U.S.C. 450b(j).

The Indian Self-Determination Act, 25 U.S.C. 450b(j) [P.L. 93-638] defines a "self-determination contract" as a contract (or grant or cooperative agreement utilized under 25 U.S.C. 450e-1) "between a tribal organization and the appropriate Secretary".

The Court of Appeals correctly observed that the purpose of the ISDEAA was to promote the long-standing policy of the United States to encourage "self-determination" by Indian tribes. The lower Courts, without citing any authority, incorrectly found that under the Act, the federal government simply "supplies funding to a tribal organization", "giving" the tribe "control over the administration of federal programs benefiting Indians." *FGS v. Carlow, supra,* 64 F.3d at 1234. Indeed, 25 U.S.C. 450b(j) expressly states: "no contract . . . entered into under part A of this subchapter ("construction contracts") shall be construed to be a procurement contract."

The record in this case shows the BIA was substantially more involved in this ISDEAA Contract than funding, retaining and exercising final control over CCI's and

the Tribe's decisions regarding the hiring of contractors and subcontractors, whether the contracts of any contractors would be made "a part of" the ISDEAA Contract, resolution of any problems in the administration of the Contract, and any proposed changes in plans and specifications. For this dam project, the BIA supervised CCI's performance of the ISDEAA Contract.

The District Court also acknowledged that the ISDEAA did not define "Indian contractor" as used in 25 U.S.C. 450f. It noted the term is not used elsewhere in the ISDEAA. Memorandum Opinion, p. 8 (19a).

The evidence showed that CCI was a "100 percent Indian-owned firm". The District Court acknowledged that within the meaning of the Buy Indian Act, as interpreted by the Supreme Court in *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 610, 100 S.Ct. 1905, 1906 n.3 (1980), CCI "would be considered an **Indian contractor.**" (Emphasis added). 11/21/94 Memorandum Opinion, p. 8 (19a).

The District Court also observed the Act does define "Indian-owned economic enterprise" in 25 U.S.C. 450e(b)(2) and 450f(2) [more than 51% Indian owned]. The District Court found that CCI met the definition of an "Indian-owned economic enterprise" as defined by these ISDEAA statutes. However, since Congress did not use the term "Indian-owned economic enterprise", but used "Indian contractor", in P.L. 101-512, amending 25 U.S.C. 450f, the District Court reasoned, it must not have intended to extend FTCA liability "to enterprises such as Cooper (CCI)". *Ibid*, p. 9 (20a).

The District Court held that under the ISDEAA, an "Indian contractor is a tribal organization" which has

entered into a Self-Determination contract. This was affirmed by the Court of Appeals for the Eighth Circuit.

While noting that FTCA coverage was extended to tort claims "resulting from the **performance of functions**" under contracts "authorized" by the ISDEAA, P.L. 101-512, the Court of Appeals for the Eighth Circuit affirmed, holding the definition of "self-determination contracts" in 25 U.S.C. 450b(j) limited such contracts to "Tribal organizations" and therefore precluded "Indian contractors" from FTCA protection unless they were really a "Tribal organization" which "may itself enter into a self-determination contract." Since CCI could not, itself, enter into an ISDEAA contract as defined by 25 U.S.C. 450b(j), it was not an "Indian contractor" within the meaning of 25 U.S.C. 450f. Therefore, by enacting P.L. 101-512, Congress did not intend the liability of the United States to cover any Indian business performing an ISDEAA contract except the tribe itself. *FGS Constructors v. Carlow, supra,* 64 F.3d at 1234-1235.

Petitioner contends that there is no authority to support the holding of the lower Courts that liability protection by the United States under 25 U.S.C. 450f, as amended, was intended by Congress to be limited to employees of only "Tribal organizations" performing an ISDEAA contract. Indeed, Congress expanded FTCA protection to include employees of "Indian Contractors", such as CCI, while acting within the scope of their duties under the ISDEAA Contract.

The history of Congressional amendments of 25 U.S.C. 450f reflects an intent to continually assume and expand the liability protection of the United States for

ISDEAA contract performance. When originally enacted on January 4, 1975, Section 450f contained in sub-section (c) the authorization for a Secretary to require a tribe requesting an ISDEAA contract, "to obtain adequate liability insurance." P.L. 93-638, Title I, Sec. 102, 88 Stat. 2206. In 1987, Congress amended sub-section (c) and added a provision deeming a "tribal organization or Indian contractor" carrying out a contract or agreement to be a part of the Public Health Service, and its employees a part of the Service as well. Thus, the United States assumed liability for PHS employees, whether contractual or by agreement.

In a rider to the 1991 Appropriations Bill, P.L. 101-512, Congress further expressly expanded liability coverage by the United States under 25 U.S.C. 450f, to include employees of Indian Tribes, tribal organizations *and* "**Indian Contractors**", while performing "any" ISDEAA contract, whether the federal agency was the Department of Health or, as in this case, the Department of Interior.

The language of P.L. 101-512, makes clear that "[w]ith respect to **claims** resulting **from** the ***performance of functions***" under "any" ISDEAA contract, employees of any "***Indian contractor***", in addition to any "Indian tribe [or] tribal organization" would be deemed "part of the Bureau of Indian Affairs . . . **and its *employees* are *deemed part of the Bureau*** or Service **while *acting within* the *scope of* their *employment in carrying out* the *contract* . . . "** Such employees would be afforded "the full

protection and coverage of the Federal Tort Claims Act."[5] (Emphasis added). See, Historical and Statutory Notes to 25 U.S.C. 450f, as amended by P.L. 101-512. *FGS Constructors v. Carlow*, 823 F.Supp. 1508, 1514 (D.S.D. 1993); *Comes Flying v. United States*, 830 F.Supp. 529, 530 (D.S.D. 1993) (Liability of the United States rejected where employees working under contract with the Department of Housing and Urban Development, not the Departments of Interior or Health and Human Services).

As the Supreme Court expressed in *Mallard v. United States District Court of Iowa*, 490 U.S. 296, 109 S.Ct. 1814 (1989), "[i]nterpretation of a statute must begin with the statute's language." *Ibid*, 490 U.S. at 300, 109 S.Ct. at 1818.

With the explicit reference to three separate and distinct "Indian" entities including Indian contractors, it is without foundation for the lower Courts to hold that Congress meant only a "tribal organization" which could enter an ISDEAA contract was an "Indian contractor" for FTCA protection under 25 U.S.C. 450f. The intent of Congress as to the exclusion or inclusion of a person within the definition of "employee" under the FTCA was dispositive as to whether a claim against the United States could

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[5] The FTCA authorizes suit against the United States for the negligence or wrongful act or omission by any employee of the government. 28 U.S.C. 2674 and 28 U.S.C. 2679. The FTCA defines an "employee of the government" as:

> **[O]fficers or employees of any federal agency . . . and persons acting on behalf of a federal agency** in an official capacity, temporarily or permanently in the service of the United States, with or without compensation. (Emphasis added).

28 U.S.C. 2671.

be maintained. See, *United States v. Orleans*, 425 U.S. 807, 817, 96 S.Ct. 1971, 1977 (1976); *Logue v. United States*, 412 U.S. 521, 529, 93 S.Ct. 2215, 2220-2221 (1973). There would be no reason for Congress to use "Indian contractor" in P.L. 101-512, a term which no where else appears in the ISDEAA, unless it intended to expand FTCA coverage to employees of Indian contractors "carrying out the functions" of an ISDEAA contract, in addition to employees of a tribe or tribal organization performing similar or other functions of such a contract.

Such language contains no suggestion the liability protection of the United States was intended to be limited to signers of the original Self-Determination Contract as defined by 25 U.S.C. 450b(j).

The expansion by Congress of FTCA coverage by enacting P.L. 101-512 to include "Indian contractors" was understood by President Bush. In signing the 1991 appropriations Bill, which included P.L. 101-512, the President stated H.R. 5769 provides: "a permanent extension of coverage of the Federal Tort Claims Act to Indian **tribes, tribal organizations, *tribal contractors* and their employees.**" (Emphasis added).

> The Act includes permanent substantive legislation with respect to the Federal Tort Claims Act that is both fiscally irresponsible and also will undermine our efforts to foster the independence and autonomy of Indian Tribes and tribal organizations.
>
> The Act provides that Indian Tribes, tribal organizations **and Indian Contractors and their employees** shall be considered employees of the United States **with respect to claims arising**

> **from contracts**, grants, and cooperative agreements **authorized by the Indian Self-Determination and Education Assistance Act** . . .

Statement of President Bush upon signing H.R. 5769, 26 Weekly Comp.Pres.Doc. 1768 (Nov. 5, 1990), reprinted in 1990 U.S.C.C.A.N. 3283-4. See, *Comes Flying v. United States, supra*, 830 F.Supp. at 530 n.2 (President Bush expressed his "distaste" for the provision). The President expressed his plan to work with Congress "to repeal this provision". It has not been repealed.

There was no reference in the language of the Act or President Bush's understanding that extension of FTCA coverage was limited to only those Indian contractors who themselves signed an ISDEAA contract, but instead referred to all claims arising from performance of an ISDEAA contract.

Due to the lower Court's opinions, clarification is needed from this Court as to Congress's intent in using the term "Indian contractors" in extending liability coverage of the United States to those employees performing ISDEAA contracts, in addition to "tribes" and "tribal organizations", under 25 U.S.C. 450f, as amended by P.L. 101-512.

II.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER BY MODIFICATION OF AN ISDEAA CONTRACT BY THE BIA TO INCLUDE AN ENGINEERING CONTRACT, LIABILITY OF THE UNITED STATES IS EXTENDED TO PROTECT EMPLOYEES OF THE ENGINEER UNDER 25 U.S.C. 450f, AS AMENDED, AND THE FTCA.

If there is a requirement, as determined by the lower Courts, that an Indian contractor's contract must be a

part of an ISDEAA contract for liability of the United States to arise under 25 U.S.C. 450f, the lower Courts erred in concluding that no such situation could or did exist in this case.

The District Court held that "mere attachment" of the CCI contract to the ISDEAA Contract "does not also make the Cooper contract a self-determination contract." Memorandum Opinion, p. 8 (19a). The Court of Appeals for the Eighth Circuit failed to address the issue.

The evidence in this case showed, however, that rather than "mere attachment", the BIA exercised its exclusive contractual authority and "modified" the ISDEAA Contract to include CCI's contract. Sub-part 100.36M(2)(d)(viii) of the Self-Determination Contract specified that the BIA had final approval of any "contract modification request **to make** the contract/subcontract a ***part of*** **the prime contract**". (Emphasis added). The BIA chose to exercise its discretionary authority and by Modifications No. 6 and 7, made CCI's Engineering Contract "a part of" the ISDEAA Contract.

Furthermore, the merged contracts involved the same subject matter – the performance of the dam reconstruction project under the Self-Determination Contract.

Petitioner contends express modification of the Self-Determination Contract to include the CCI and Carlow Contracts as part of the ISDEAA Contract, merged them into one larger ISDEAA Contract and extended FTCA coverage to employees of the Indian contractors.

Under South Dakota Supreme law:

> 'When **two or more instruments** are executed at the same time by the same parties, for the same purposes as **part of the same transaction**, the court must consider and construe the instruments as ***one contract.***' *GMS [Inc.] v. Deadwood Social Club, Inc.*, 333 N.W.2d [442,] at 444 [(S.D. 1983)](emphasis added in original). Moreover, it is **not critical** whether the documents were **executed** at exactly the **same time** or whether the **parties** to each agreement are **identical**. (Emphasis added).

Baker v. Wilburn, 456 N.W.2d 304, 306 (S.D. 1990).

The *Baker* Court then noted the language of Federal contract law:

> 'Where **several writings** are **connected by internal references to each other**, even if they were executed on different dates and were not among all of the same parties, they will constitute a **single contract** as long as they **involve** the **same subject matter** and prove to be **parts of the entire transaction**.' (Emphasis added).

Baker v. Wilburn, supra, 456 N.W.2d at 306 [quoting, *Hampton Roads Shipping Ass'n v. International Longshoremen's Ass'n*, 597 F.Supp. 709, 716 (E.D.Va. 1984)].

Here, the CCI Contract became a part of the ISDEAA Contract by the BIA's express modification of the Prime Contract. The CCI Contract thus became part of *the one* Self-Determination Contract creating privity of the Federal contract between CCI, the Tribe, and the BIA.

The merging of contracts made employees of CCI, "employees" of the BIA for performance of the White

Clay Dam Project. They were therefore not "independent contractors" excluded from coverage under the FTCA. *United States v. Orleans, supra,* 425 U.S. at 817, 96 S.Ct. at 1977; *Logue v. United States, supra,* 412 U.S. at 530.

Since the BIA had a direct contractual role in the day to day operation of the Project under the Self-Determination Contract, in addition to privity of contract, and was so directly involved in the supervision of this Project, employees of CCI would be "employees" of the federal government under the FTCA, as well as P.L. 101-512. See, *United States v. Becker,* 378 F.2d 319, 321-322 (9th Cir. 1967) (defendant subject to close supervision and control of Forest Service); *Wollman v. Gross,* 484 F.Supp. 598, 601 (D.S.D. 1980) (director of Agricultural Stabilization and Conservation Services is "employee" under FTCA since ASCS structure "has been recognized as a 'hierarchy of command' functioning as a government agency under the overriding authority and control of the Secretary of Agriculture and his appointees").

The United States contractually and operationally assumed liability for any negligent performance of the Self-Determination Contract by CCI. Such an interpretation of the ISDEAA Contract in this case is consistent with its purpose as expressed by the language of P.L. 101-512, regarding the extension of liability protection by the United States for the torts of "Indian Contractors" in the performance of ISDEAA contracts.

CONCLUSION

The lower Courts, in this case of first impression, have excluded non-governmental "Indian contractors", such as CCI, from liability coverage of the United States, under 25 U.S.C. 450f as amended by P.L. 101-512. Since these Courts have interpreted the statute seemingly contrary to the express language used by Congress in extending such FTCA coverage to "Indian contractors", in addition to "Tribes" and "tribal organizations" performing the ISDEAA contract, it is imperative for this Honorable Court to clarify and determine the intent of Congress. The lower Courts having failed to do so, it is also important for certiorari to be granted to clarify whether the BIA may by express modification of an ISDEAA contract, make an Indian contractor's contract a part of the ISDEAA contract and thereby make the Indian contractor's employees, employees of the BIA for purposes of FTCA coverage under 25 U.S.C. 450f, as amended.

Respectfully submitted,

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